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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 29 1997

In the Matter of:	)	
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Federal-State Board on Universal Service;	)	CC Docket No. 96-45
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.	)	
	)	
	)	
Request for Waiver of the	)	
Universal Service Fund Contribution of	)	
MobileMedia Communications, Inc.	)	

To: The Commission

APPLICATION FOR REVIEW

Robert L. Pettit
Kurt E. DeSoto
Daniel J. Smith
of
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 429-7000

Its Attorneys

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TABLE OF CONTENTS

Page

SUMMARY -- 2

BACKGROUND--- 3

DISCUSSION-- 4

I. The Division's Summary Denial Is Wrong as a Matter of Law Because It Essentially Promulgates a No-Waiver Policy and Because the Division Lacks Authority to Address the Novel Question of Law Presented in this Case------- 4

II. Bankruptcy Reorganization Represents "Special Circumstances" Justifying Waiver of the USF Contribution Requirements -------------------------------7

III. Grant of MobileMedia's Request Will Not Undermine the Goals of the USF and is in the Public Interest--- 8

IV.The Division's Position is Inconsistent with the Other Commission Action Granting Licensees Relief from Financial Obligations ----------------------------9

CONCLUSION -- 11

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APPLICATION FOR REVIEW

MobileMedia Communications, Inc. ("MobileMedia"), by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby submits this Application for Review of the Common Carrier Bureau Accounting and Audits Division's ("Division") Order denying MobileMedia's request for a waiver of Universal Service Fund ("USF") contribution requirements.[1] In that Order, the Division summarily rejected MobileMedia's request for either an exemption from or a substantial reduction of its projected USF contribution so as to assist it in its Chapter 11 bankruptcy reorganization. The Division stated that USF "contributions, once

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[1] Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket No. 97-21, *Order*, DA 97-2061(AAD/CCB, rel. Sept. 29, 1997) ("*Order*").

assessed, are a financial obligation and this obligation shall not be waived because of potential financial problems that may be created by the financial obligation."[2]

SUMMARY

The Commission has the authority and a legal requirement to waive any provision of its Rules or Orders "for good cause" under Section 1.3 of its Rules.[3] The Division therefore may not legally adopt a blanket policy, as it has done here, to refuse to grant -- or even consider -- waivers of the USF requirement.

As interpreted by the courts, a waiver is justified "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"[4] or if it "will not undermine the policy, served by the rule, that has been adjudged in the public interest."[5] That is the case here. The grant of MobileMedia's waiver would not undermine the goals of the USF yet would further the public interest by addressing the needs of the Company, its creditors, and its subscribers during the bankruptcy reorganization.

Moreover, the relief MobileMedia requests is consistent with that granted by the FCC in similar contexts, and the Division has not provided a rational basis for departing from this precedent.

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[2] *Order* at ¶ 2.

[3] 47 C.F.R. § 1.3 (1996).

[4] *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) at 1159).

[5] *WAIT Radio*, 418 F.2d at 1157.

BACKGROUND

MobileMedia is one of the largest paging companies in the United States and provides messaging services to approximately 3.6 million subscribers. On January 30, 1997, MobileMedia filed petitions under Chapter 11 of the Bankruptcy Code because it was in default on over $1 billion in secured and unsecured debt obligations.

In May of 1997, the Commission formally adopted rules that expanded the list of entities that are required to contribute directly to the USF and, for the first time, MobileMedia became obligated to contribute to the USF.[6] Using Commission staff estimates, MobileMedia projects that its "first half-year" contribution to the USF could be approximately $3.8 million.[7] This newly required contributions represents a substantial burden on the Company as it undergoes reorganization.[8]

Therefore, in September, MobileMedia requested a waiver or reduction of its of its USF contribution requirement.[9] The Chief of the Accounting and Audits Division, Common Carrier

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[6] *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order* (rel. May 8, 1997) (adopting 47 C.F.R. § 54.703) ("*USF Order*"). Although contributors are allowed to pass through USF costs to their end users, the Commission anticipates that contributors in competitive markets, such as the paging market, may not be able to do so. *USF Order* at ¶ 855.

[7] This estimate is based on informal Commission staff estimates that MobileMedia will be required to contribute 1.5% of its estimated intrastate revenues and 4.5% of its estimated interstate revenues for the period January 1 through June 30, 1997.

[8] MobileMedia also may be forced to seek a stay of any requirement to submit its payment, once an invoice is issued by the USF administrator, pending resolution of this Application for Review.

[9] *See* Letter from Debra P. Hilson, Asst. Secretary, MobileComm, to Secretary, FCC (Sept. 2, 1997), revised (Oct. 6, 1997).

Bureau, summarily rejected MobileMedia's waiver request.[10] The Division concluded that MobileMedia "failed to demonstrate special circumstances that would warrant waiver of the contribution requirement."[11] However, the Division based its conclusion on a rather sweeping policy statement. In essence, it stated that waivers will not be granted for Commission imposed financial obligations on the grounds that such obligations might create financial problems for licensees.[12]

MobileMedia seeks review of this ruling and asks the Commission to grant it either a waiver or substantial reduction of its contributions to the USF under Section 54.703.

DISCUSSION

I. The Division's Summary Denial Is Wrong as a Matter of Law Because It Essentially Promulgates a No-Waiver Policy and Because the Division Lacks Authority to Address the Novel Question of Law Presented in this Case

As noted above, the Commission has adopted a new set of USF rules that broadens the category of USF contributors to include paging companies. In this regard, MobileMedia notes that there is no statutory requirement to impose USF requirements on paging companies, let alone companies that are undergoing bankruptcy reorganization. Therefore, the FCC has the ability -- and indeed a regulatory obligation -- to address the impact of its rules on its regulatees.

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[10] *See Order*, supra at note 2.

[11] *Id.* at ¶ 2.

[12] *See id.*

Many issues relating to the contributions required from new entities will arise for the first time and should not be addressed summarily by the Division.[13] Underlying MobileMedia's request is the issue whether bankruptcy represents "special circumstances" that would justify a waiver from Section 54.703 of the Commission's Rules. When a request raises such novel issues, "an agency must not dismiss it with the routine treatment that might suffice in the

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[13] In this regard, MobileMedia concurs with the concerns raised by several parties in recent reconsideration proceedings before the Commission involving the Universal Service fund in CC Docket No. 97-21. Specifically, Comcast Cellular Communications, Inc., Vanguard Cellular Systems, Inc., AirTouch Communications, Inc. ("AirTouch"), the Personal Communications Industry Association, and the Cellular Telecommunications Industry Association have all urged the Commission to direct the USF administrator to calculate the amounts due from telecommunications carriers to the universal service fund on an annual basis instead of on a quarterly basis. *See* Petition for Reconsideration of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., CC Dkt Nos. 97-21, 96-45, at 3-7 (filed Sept. 2, 1997); AirTouch Communications, Inc. Comments in Support of Petition for Reconsideration, CC Dkt. Nos. 97-21, 96-45, at 1-4 (filed Oct. 2, 1997) ("AirTouch Comments"); Comments of the Personal Communications Industry Association on Petition for Reconsideration, CC Dkt. Nos. 97-21, 96-45, at 4-6 (filed Oct. 2, 1997) ("PCIA Comments"); Comments of the Cellular Telecommunications Industry Association, CC Dkt. Nos. 97-21, 96-45, at 2-3 (filed Oct. 2, 1997). As summarized by AirTouch, "quarterly adjustments create significant business uncertainty which are likely to cause unnecessary harm to competitive, publicly traded companies, with few offsetting benefits." AirTouch Comments at 3. Similarly, PCIA aptly observed that "businesses will have no ability to engage in rational planning or to ensure that they are fulfilling their obligations and fiduciary duties to their shareholders." PCIA Comments at 4-5. Announcement of quarterly contribution factors simply will not permit any telecommunications carrier, and particularly an entity like MobileMedia, to engage in meaningful business planning for the calculation and collection of its universal service obligations. Given MobileMedia's current financial situation, this uncertainty, as well as the lack of a reasonable notice period, could have a significant negative impact on its business. The Commission should act quickly to provide greater business certainty and to take into account business and marketplace realities more effectively than it has to date in its handling of universal service contribution issues affecting commercial mobile radio service providers.

ordinary case."[14] Instead, the Division "must state its basis for decision with greater care and clarity."[15]

In its rejection of MobileMedia's request, the Division failed to satisfy this standard. The totality of the Division's reasoning was that: "Universal service contributions, once assessed, are a financial obligation and this obligation shall not be waived because of potential financial problems that may be created by the financial obligation."[16] In essence, the Division's statement -- without additional explanation or refinement -- amounts to the adoption of a blanket policy not to grant waivers of its USF requirements. Its decision suggests that the Commission will ignore any effect that its fees impose on its licensees when they seek a waiver of those fees. In other words, the Division's policy holds that the Commission will not examine the effect on the public interest of the imposition of USF obligations in individual cases.

However, in WAIT Radio, the Court made clear that "the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances" and "a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties."[17] The Court emphasized that an agency has a legal "obligation to seek out the

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[14] *WAIT Radio,* 418 F.2d at 1156.

[15] *Id.*

[16] *Order* at ¶ 2.

[17] *WAIT Radio*, 418 F.2d at 1157

'public interest' in particular, individualized cases."[18] Therefore, the Division's decision essentially not to grant any waiver *under any circumstances* is incorrect as a matter of law.

Moreover, the Division has exceeded its delegated authority to address MobileMedia's request or to apply a no-waiver policy here. Section 0.291 of the FCC's rules states specifically that the Bureau "shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guildelines."[19] Thus, the Commission -- rather than the Division -- should address MobileMedia's novel question in this context regarding the effect of bankruptcy proceedings on a licensee's obligations to contribute to the FCC's newly adopted USF programs.

II. Bankruptcy Reorganization Represents "Special Circumstances" Justifying a Waiver of the USF Contribution Requirements

The Commission has long recognized that it should evaluate companies undergoing bankruptcy proceedings differently from other companies. Under such "special circumstances," the Commission has balanced the purpose of its rules against the needs of the company in bankruptcy and its creditors. For example, in the context of the assignment or transfer of licenses, the FCC has held -- and the Courts have affirmed -- that the agency should "balance the

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[18] *Id.*

[19] 47 C.F.R § 0.291 (b)(1996).

possible injury to the Commission's regulatory authority . . . against the public interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party."[20]

The circumstances in this case present a similar need for the FCC to "balance" the purpose of its rules against the needs of the Company, its creditors, and the subscribers it serves during bankruptcy reorganization. The Division, however, has failed to undertake such an evaluation.

III. Grant of MobileMedia's Request Will Not Undermine the Goals of the USF and is in the Public Interest

Of the four goals the new USF rules advance, two are especially relevant here: (1) to "maintain rates for basic residential service at affordable levels," and (2) to "bring the benefits of competition to as many consumers as possible."[21] A waiver is justified in this case because exempting MobileMedia from its USF contribution will not undermine the first goal of the USF, whereas denying a waiver to MobileMedia would undermine the second.

MobileMedia's anticipated contribution based on "first half" 1997 revenues, as noted above, could be approximately $3.8 million. The contribution from all telecommunications carriers to the USF is estimated to be approximately $5 billion. Using this estimate, MobileMedia's first half contribution to the USF would be only about eight one-hundredths of one percent (0.0008) of the estimated total fund. The USF will not be crippled or prevented from

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[20] *La Rose v. FCC*, 494 F.2d 1145, 1149 (D.C. Cir. 1974); see also *Second Thursday Corp.*, 22 FCC 2d 515, recon. 25 FCC 2d 112 (1970).

[21] Federal-State Joint Board on Universal Service, CC Dkt No. 96-45, *Report and Order*, FCC 97-157 (rel. May 8, 1997) at ¶ 2 (emphasis added).

achieving its goals without MobileMedia's contribution. On the other hand, if the Commission denies MobileMedia's request, its working capital position would be significantly impaired and its ability to compete in the industry would be impacted.

Another goal of the USF in the wake of the 1996 Telecommunications Act is to promote competition. The Commission expressly recognized this goal when it concluded that the rules governing the USF also must "respond to competitive pressures" and "promote competitive entry."[22] In this case, granting a waiver to MobileMedia would advance the goal of competition by preserving capital it would use in its day-to-day operations. MobileMedia is one of a limited number of facilities-based companies providing nationwide messaging services. It also operates numerous local and regional systems. MobileMedia's services reach all 50 states and a significant percentage of the U.S. population. Its operations and the operations of those entities reselling its services increase the options available to subscribers for messaging capabilities. Thus, MobileMedia has clearly demonstrated that the public interest warrants waiver of the USF requirements.

IV. The Division's Position is Inconsistent with the Other Commission Action Granting Licensees Relief from Their Financial Obligations

The Division's decision also is inconsistent with other actions the Commission has taken to waive licensee financial obligations. The most recent example involves the Commission's

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[22] Federal-State Joint Board on Universal Service, CC Dkt No. 96-45, *Report and Order*, FCC 97-15 (rel. May 8, 1997), ¶ 18.

Order granting relief to PCS bidders.[23] In that Order, the Commission suspended enforcement of its PCS installment payment rules and adopted three options for PCS licensees to satisfy their notes. The reason given for the action: "to provide limited relief to C block licensees having *difficulty meeting their financial obligations to the Commission*."[24]

In addition, the Commission has routinely granted requests for waiver of its fees assessed upon companies undergoing bankruptcy or financial hardship in numerous other cases, including MobileMedia's.[25] In these cases, the licensee incurred a financial obligation arising from the

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[23] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Dkt. No. 97-82, *Second Report & Order & Further Notice of Proposed Rulemaking*, FCC 97-342, at ¶ 6 (rel. Oct. 16, 1997) (granting relief to PCS bidders from their "existing installment payment obligations").

[24] *Id.* at ¶ 6 (emphasis added).

[25] *See, e.g.,* Letter to Ronald R. Grawert, CEO from Marilyn J. McDermett, Assoc. Managing Dir. for Ops. (Sept. 12, 1997); Letter to John S. Neeley, Esq., from Marilyn J. McDermett, Assoc. Managing Dir. for Ops. (Apr. 18, 1997) (granting waiver to American Broadcasting Systems, Inc. for a waiver and refund of FY 1996 Regulatory Fees due to Chapter 11 reorganization); Letters to Brian M. Madden, Esq., from Marilyn J. McDermett, Assoc. Managing Dir. for Ops. (Apr. 17, 1996 & Oct. 25, 1996) (granting requests of bankruptcy trustee for waivers of FY 1995 & FY 1996 Regulatory Fees for Radio Station WUSS); Letters to Jack Lotsof, Pres. of Stereo 97, Inc., from Marilyn J. McDermett, Assoc. Managing Dir. for Ops. (Feb. 23, 199 & Mar. 27, 1997) (granting waivers of FY 1994, 1995 & 1996 Regulatory Fees for FM Station KAVV-FM because of existing state of undue financial hardship); Letter to R. Edward Price, Esq., from Marilyn J. McDermett, Assoc. Managing Dir. for Ops. (Nov. 14, 1996) (granting waiver request to defer payment and waive FY 1996 Regulatory Fees for two stations based on receivership status of stations). *See also* Letter to Michael J. Guzman, Esq., *et. al*, Counsel for MobileMedia, from Marilyn J. McDermett, Assoc. Managing Dir. For Ops. (July 30, 1997) (granting to MobileMedia Corp. and subsidiaries a waiver and refund of FCC application fees due to Chapter 11 reorganization; and *Data Transmission Company, Bankrupt by Its Receiver*, 61 FCC 2d (1976) (granting to Data Transmission Company, which was in receivership, a wavier of FCC application fees, strengthening its ability to provide public service).

Commission's Rules. Yet, in this case, the Division provided no reason for its apparent departure from this long standing policy. Instead, it dismissed MobileMedia's request.

The Division's departure from established precedent without a rational basis cannot withstand judicial scrutiny. As the Court stated in Greater Boston, an "agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[26]

The Commission should therefore grant MobileMedia's application for review and take a "hard look" at the requested waiver. Upon such a review, MobileMedia submits that grant of the requested relief would be justified.

CONCLUSION

As illustrated above, the grant of a waiver to MobileMedia is justified in this case because the application of Section 54.703 "would not be in the public interest in the particular circumstances under review."[27] A waiver would not undermine the USF goals and would serve the public interest by meeting the needs of MobileMedia, its creditors, and its subscribers. A

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[26] *Greater Boston Television Corp. v. FCC*, 444 F.2d, 841, 852 (D.C. Cir. 1970)(footnotes omitted).

[27] *The NYNEX Telephone Companies Petition for Waiver Transition Plan to Preserve Universal Service in a Competitive Environment*, 10 FCC Rcd 7445, 7458 (1995) (Memorandum Opinion & Order).

waiver also would be consistent with analogous agency decisions granting similar relief to licensees. For these reasons, MobileMedia respectfully asks the FCC to grant its application for review and either waive or substantially reduce MobileMedia's anticipated contribution to the USF.

Respectfully submitted,

MOBILEMEDIA COMMUNICATIONS, INC.

Kurt E. DeSoto

Robert L. Pettit
Kurt E. DeSoto
Daniel J. Smith
of
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 429-7000

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